

ProxyVote Plus, LLC



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Filed Electronically

February 3, 2020

Ms. Vanessa A. Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice;
File No. S7-22-19

Dear Ms. Countryman:

ProxyVote Plus, LLC (“ProxyVote”) submits these comments in response to the above-referenced proposal to regulate proxy advice as a proxy solicitation under the Securities Exchange Act of 1934 (“Exchange Act”).¹ ProxyVote strenuously objects to every aspect of this rulemaking, which seeks to interpose self-interested parties between proxy advisers and their investor clients, thereby upending long-standing fiduciary relationships. The proposed rule amendments are unlawful, unconstitutional, not economically justified and anti-competitive, and we urge the SEC to withdraw this proposal swiftly and entirely. If this rulemaking does proceed, we ask the Commission to confirm that ProxyVote does not “solicit” proxies as that concept would be redefined under Exchange Act Rule 14a-1(l).² In the alternative, we ask to be exempted from the proposed revisions of the proxy rules on the grounds that we are a small entity that would find it very hard, if not impossible, to compete under the burdens of the new requirements.

BACKGROUND

We formed ProxyVote in 2002: I have almost thirty years of experience in the proxy adviser industry. Since its inception, ProxyVote has been focused on providing high-quality, discretionary

¹ *Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice*, Exchange Act Rel. No. 87457 (Nov. 5, 2019), 84 Fed. Reg. 66518 (Dec. 4, 2019), available at <https://www.sec.gov/rules/proposed/2019/34-87457.pdf> (“Proposing Release”).

² References in this letter to Exchange Act rules are to Title 17, Part 240 of the Code of Federal Regulations [17 C.F.R. 240].

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proxy advisory services to Taft-Hartley pension plans.³ The firm is registered with the SEC as an investment adviser pursuant to the Investment Advisers Act of 1940 (“Advisers Act”), under the registration category for pension consultants,⁴ and is a fiduciary for purposes of the Employee Retirement Income Security Act of 1974 (“ERISA”).⁵ ProxyVote currently has five employees, approximately 135 clients, and less than \$5 million in assets. We do not sell services to issuers or investment managers, nor do we have any operating affiliates.⁶

The vast majority of our clients have relied on our services for more than ten years, and many have been with us since our formation. The participants and beneficiaries in our clients’ plans come from almost every state in the Union. They are hundreds of thousands of working men and women who are bus drivers, carpenters, drywallers, electricians, laborers, painters, plumbers, sheet metal workers and workers engaged in similar trades. Ensuring that they have dignified, financially secure retirements is a sacred trust. We are proud of the fact that we have never sought fee increases from our clients, because we recognize the extraordinary pressures Taft-Hartley and other pension plans face as they seek to protect the retirement income of these hard-working men and women.

The proxy advisory services ProxyVote renders are materially different from the services provided by other proxy advisers identified in the SEC’s proposal. Unlike other advisers, ProxyVote does not create or issue research reports or vote recommendations to assist clients in making voting decisions for their own shares or for shares they manage on behalf of others.⁷ Instead, ProxyVote is a designated plan fiduciary that exercises discretionary authority over a client’s proxy voting. The process by which this occurs is as follows:

ProxyVote has developed a single set of proxy voting guidelines designed to protect the long-term economic interests of our clients’ participants and their beneficiaries. These guidelines are reviewed and approved for use by each client, who designates ProxyVote as the fiduciary responsible for voting proxies appurtenant to shares owned by the plan. Investment decisions regarding these shares are made by other fiduciary investment managers, not by ProxyVote.

Working with clients’ administrators, custodial banks and Broadridge, ProxyVote has established a system to receive ballots for all client votes. When a ballot is received, we review the proxy

³ A “Taft-Hartley” pension plan is a collectively-bargained retirement plan maintained by more than one employer and a labor union, pursuant to the Taft-Hartley Labor Act of 1947. In addition to Taft-Hartley pension plans, ProxyVote provides proxy voting services to annuity and health and welfare funds and certain public pension plans as well.

⁴ Advisers Act Rule 203A-2(a). References to the Advisers Act are to 15 U.S.C. §§ 80b-1 *et seq.*, and references to Advisers Act rules are to Title 17, Part 275 of the Code of Federal Regulations [17 C.F.R 275].

⁵ ERISA, § 3(21), 29 U.S.C. § 1002(21).

⁶ ProxyVote’s ownership structure is disclosed on Schedule A of our Form ADV, which is available through the SEC’s website at: <https://www.adviserinfo.sec.gov/Firm/122222>.

⁷ We do not have any investment advisers as clients.

statement and other publicly available information we deem reliable and determine the appropriate vote, consistent with our proxy voting guidelines, always focused on protecting the long-term economic interests of clients' participants and their beneficiaries. We cast votes on the complete range of management and shareholder proposals, such as the election of directors, executive compensation, corporate governance, and enhanced disclosure of corporations' conduct, as it has a bearing on companies' long-term performance and viability. Promoting management accountability is a key factor in ensuring that the plans own companies that thrive, and are thus strong, long-term investments. While this often leads us to vote in favor of management proposals, we do not hesitate to vote against management when we determine that it is in plans' long-term interests to do so.

Once votes have been determined, we electronically transmit those votes to Broadridge, who handles the mechanics of the voting process. This is done on a meeting-by-meeting basis. We do not utilize standing voting instructions or other pre-populated voting mechanisms. We internally document the rationale for each vote cast and use these records to create detailed annual or semi-annual reports for our clients. These reports identify each proposal presented for vote, how we voted, and why we did so. Plan trustees use these reports to monitor the services we provide, thus conferring an additional layer of fiduciary protection on plan participants and beneficiaries.

The existing process affords us ample opportunity to hear what issuers think about matters requiring shareholder approval. We do not need, and cannot accommodate, the intrusive measures the SEC proposes in the instant rulemaking. The proposed measures also clearly conflict with our existing fiduciary obligations to our clients.

LEGAL ANALYSIS

The Current Regulatory Landscape

ProxyVote's advisory activities are governed by two complementary fiduciary statutes: The Advisers Act and ERISA. As a fiduciary under the Advisers Act, ProxyVote owes its clients duties of care and loyalty and must, at all times, act in the clients' best interests. According to the SEC, the duty of care obliges us to make a reasonable investigation to determine that we are not basing our discretionary proxy advice on materially inaccurate or incomplete information.⁸ The duty of loyalty requires us to "eliminate or at least expose through full and fair disclosure all conflicts of interest which might incline [us] — consciously or unconsciously — to render advice [that is] not disinterested."⁹

⁸ *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, Advisers Act Rel. No. 5248 (June 5, 2019) at 16, 84 Fed. Reg. 33669, 33674 (July 12, 2019) ("Fiduciary Standard Release"), citing *Concept Release on the U.S. Proxy System*, Exchange Act Rel. No. 62495 (July 14, 2010) at 119, 75 Fed. Reg. 42982, 43012 (July 22, 2010) ("Concept Release").

⁹ Fiduciary Standard Release at 23, 84 Fed. Reg. at 33676, citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-92 (1963).

The Advisers Act further imposes a host of specific regulatory obligations on ProxyVote, in order to enforce these general fiduciary duties. These obligations include a requirement to adopt proxy voting guidelines to reasonably ensure that votes are cast in clients' best interests; a requirement to disclose those guidelines to clients, and offer to disclose votes cast on clients' behalf; a duty to adopt a code of ethics to address standards of conduct and conflicts of interest and to disclose that code to clients upon request; a duty to make full and fair disclosure regarding conflicts of interest; a duty to implement, test and enforce a comprehensive set of written compliance procedures; and extensive recordkeeping requirements.¹⁰

For its part, ERISA obliges ProxyVote to discharge its duties with respect to its plan clients solely in the interest of plan participants and their beneficiaries, and to act with the care, skill, prudence and diligence under the circumstances that a prudent person acting in a like capacity would use in a similar situation.¹¹

The U.S. Department of Labor ("DOL"), the agency tasked with enforcing ERISA, has long taken the position that "the fiduciary act of managing plan assets which are shares of corporate stock would include the voting of proxies appurtenant to those shares of stock."¹² The DOL has also advised that practices such as declining to vote proxies or blindly voting all proxies with management are inconsistent with the fiduciary responsibility provisions of ERISA.¹³ ERISA permits a covered plan either to retain proxy voting authority or to delegate such authority to another fiduciary, such as a registered investment adviser. That investment adviser can either be a general investment manager, or a specialized proxy vote manager, like ProxyVote.

The Proposed Regulation of Proxy Advisers Under the Exchange Act Proxy Rules

The Commission proposes to upend the historic regulatory treatment of proxy advisers by subjecting these dispassionate professionals to Exchange Act rules designed for parties who communicate with shareholders about their corporate voting rights in order "to maintain or gain control of a corporation."¹⁴ In so doing, the Commission has exceeded its statutory authority, ignored the plain-English distinction between "soliciting" and "advising," and gone to extraordinary—and unconstitutional—lengths to give corporate managers the ability to interfere in the fiduciary relationship between a proxy adviser and its clients. The many fatal flaws in this proposal are discussed at length in the comment letter submitted by Institutional Shareholder Services ("ISS") in

¹⁰ See Advisers Act Rules 206(4)-6, 204A-1, 203-1, 206(4)-7 and 204-2.

¹¹ ERISA § 404(a), 29 U.S.C. § 1104(a).

¹² Letter from Alan D. Lebowitz, Deputy Assistant Secretary, DOL to Mr. Helmuth Fandl, Chairman of the Retirement Board, Avon Products, Inc. (Feb. 23, 1988), 1988 ERISA LEXIS 19, *5-6, *codified in* 29 C.F.R. § 2509.2016-01.

¹³ Pension & Welfare Benefits Admin., DOL, Proxy Project Report 8 (1989).

¹⁴ *Greater Iowa Corp. v. McLendon*, 378 F.2d 783, 795 (8th Cir. 1967).

this matter.¹⁵ ProxyVote endorses the ISS Comment Letter without restating here all the reasons this rule proposal should be withdrawn.

However, ProxyVote is compelled to raise two additional issues that must be addressed if the Commission persists in this rulemaking. The first is that, although the Proposing Release includes ProxyVote in its discussion of the U.S. proxy advisory firm market,¹⁶ our firm's activities do not, in fact, meet the proposal's new definition of "solicitation." The Commission proposes to redefine the terms "solicit" and "solicitation" under Exchange Act Rule 14a-1(l) to include any

*proxy voting advice that makes a recommendation to a security holder as to its vote, consent, or authorization on a specific matter for which security holder approval is solicited, and that is furnished by a person that markets its expertise as a provider of such proxy voting advice, separately from other forms of investment advice, and sells such proxy voting advice for a fee.*¹⁷

For purposes of this definition, "proxy voting advice" would include proxy advisers' vote recommendations, along with the research and analysis they provide to enable their clients to evaluate the recommendations and make informed voting decisions.¹⁸

As explained above, ProxyVote does not supply research, analysis and recommendations to its clients and its clients do not make voting decisions. As a fiduciary that is a discretionary proxy vote manager, ProxyVote's activities are more akin to those of investment advisers who vote proxies as part of their general asset management duties, than they are to traditional research-and-vote-recommendation proxy advisory firms.

A finding that the new definition of "solicitation" does not apply to ProxyVote is further supported by the fact that none of the other aspects of the proposed rule amendments makes any sense for our firm. Since we do not deliver advice to clients before executing proxy votes on their behalf, there is nothing for us to send to registrants and other covered solicitors for "feedback" on, and no place for these self-interested parties to insert their "response" to voting decisions of ours that displease them. Likewise, there is no pre-vote medium through which to notify clients that, consistently with our proxy voting guidelines, we intend to hold management to standards higher than the lowest ones allowed by law, as would be required by revised Exchange Act Rule 14a-9. Finally, since we already make full and fair conflict-of-interest disclosures in accordance with the Advisers Act and ERISA, requiring us to include such disclosures in our "advice" and "any electronic medium used to deliver" that advice is as unnecessary as it is meaningless.

¹⁵ Letter from Gary Retelny, President and CEO, ISS to Vanessa A. Countryman, Secretary, SEC (Jan. 31, 2020) ("ISS Comment Letter").

¹⁶ Proposing Release, *supra* note 1 at 83-85, 88-89, 84 Fed. Reg. at 66542-66543.

¹⁷ Proposed Rule 14a-1(l)(1)(iii)(A); *see* Proposing Release at 136, 84 Fed. Reg. at 66557.

¹⁸ Proposing Release at 8, 84 Fed. Reg. at 66519.

Should this rulemaking go forward (despite all the cogent reasons against it), we ask the Commission to confirm that ProxyVote does not render the type of “proxy voting advice” described in Rule 14a-1(l)(1)(iii)(A), and thus, that the Exchange Act proxy rules do not apply to our firm.

ECONOMIC ANALYSIS

The Commission has utterly failed to demonstrate that the benefits of this proposal outweigh the costs. Although the Proposing Release reports vague “concerns” about proxy advisers voiced by certain corporate managers and their trade groups, the release is devoid of any evidence that there is a problem for the SEC to solve. The investors who use proxy advisory services certainly do not think there is.

While the benefits of this rulemaking are speculative at best, the costs are real and very harmful. As far as proxy advisers are concerned, the proposal would force independent fiduciaries to involve self-interested parties in the selection of fiduciaries’ methodologies and formulation of opinions, all under the threat of litigation. The administrative and operational costs of complying with the review, feedback and response provisions, coupled with the cost of revising existing compliance programs to address this new conflict of interest, would be substantial, indeed, likely prohibitive. In our case, unless the Commission confirms that we are excluded from the proposed new definition of “solicitation,” our firm would be vulnerable to demands by aggressive corporate managers with deep pockets that we notify them of our voting decisions before implementing them and afford the managers an opportunity to talk us out of any decisions they do not like. Or, they might demand a role in preparing the annual/semi-annual reports we deliver to clients.

Were this to occur, the harm would not be limited to ProxyVote, but most importantly would extend to our clients, Taft-Hartley plans entrusted with the duty of providing secure retirements for their participants and beneficiaries. Were we subject to the new rule amendments, the likely outcome would be a significant fee increase for our services or sale of our firm to one of the two dominant proxy advisers in the industry.

There can be no doubt that the SEC’s proposal would limit the ability of smaller proxy advisers or potential new market entrants to operate and compete in the market for proxy advisory services.¹⁹ Exempting small entities (as defined under the Regulatory Flexibility Act)²⁰ from these burdensome requirements would make it *more* likely, not less, that institutional investors would use small entities’ proxy advisory services, because investors have made it clear that they do not want issuers interfering with their fiduciary relationships with their advisers.

Should the Commission proceed with this rulemaking without confirming that ProxyVote is not engaged in a solicitation under Rule 14a-1(l), we ask the Commission to exempt ProxyVote and other small entities, if any, from the proposed rule amendments.

¹⁹ See Proposing Release at 75, 84 Fed. Reg. at 66539, Questions 62 and 63.

²⁰ 5 U.S.C. §§ 601 - 12. For the reasons explained herein, ProxyVote is such an entity.

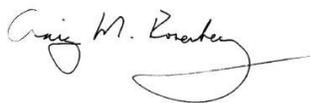
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CONCLUSION

For all of the foregoing reasons, we respectfully urge the SEC to withdraw this flawed proposal in its entirety. In the alternative, we ask for confirmation that ProxyVote is not a proxy solicitor, or for an exemption from the proposed rule amendments.

We would be happy to supply the Commission or the staff with additional information regarding any of the matters discussed herein. Please direct questions about these comments to the undersigned, or to our outside counsel, Mari-Anne Pisarri, who can be reached at [REDACTED].

Sincerely,

A handwritten signature in black ink, appearing to read "Craig M. Rosenberg". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Craig M. Rosenberg, President

Cc:

The Honorable Jay Clayton, Chairman

The Honorable Robert J. Jackson, Jr.

The Honorable Hester M. Peirce

The Honorable Elad L. Roisman

The Honorable Allison H. Lee

Dalia Blass, Director, Division of Investment Management

William Hinman, Director, Division of Corporation Finance

Rick Fleming, Office of the Investor Advocate